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In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL T. WIGODA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PAUL T. WIGODA,

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul T. Wigoda, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 20, 1975.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 521 F.2d 1221, and is reprinted as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on August 20, 1975. A timely Petition for Rehearing and Suggestion of Rehearing en banc was filed, ordered answered, but denied on November 6, 1975. (Appendix C, *infra.*) This Petition is filed within thirty days of that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant in a criminal case is deprived of a fair trial, as guaranteed by the due process clause of the Fifth Amendment, and the right to confront witnesses, as guaranteed by the Sixth Amendment by a prosecutor's opening final argument which asks the jury to infer the contents of certain conversations, not admitted into evidence, and which, thereby, bolsters the credibility of the principal prosecution witness by suggesting that the prosecutor and the government possess knowledge of facts, which the government has not been allowed to reveal to the jury, showing that the defendant had demanded or been promised the money he was alleged to have received as a bribe?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *

STATEMENT

Petitioner, a Chicago Alderman, was charged in one count with filing a false 1969 income tax return by failing to report, in his adjusted gross income, $50,000 which he was alleged to have received as a bribe.[1] At the jury trial which followed, government witness Robert Haskins testified, under a grant of immunity, that he gave petitioner an envelope which had been given him by Roy Gottlieb. (Tr. 122-24)[2] Gottlieb testified this envelope contained $50,000. (Tr. 272)

The $50,000 was accumulated by Gottlieb and his associates in a real estate venture after their successful efforts to have certain property rezoned. The government proposed to show that the developers raised this money as the result of a conversation between Gottlieb and Haskins, who served as attorney for the developers during the rezoning efforts. During the conversation, which took place within a two or three week period following passage of the City Ordinance approving the zoning change, Haskins told Gottlieb to obtain $50,000 because he (Haskins) needed "to spread it out." (Tr. 225-c; R. 46) It was acknowledged by the government during trial that this conversation did not incriminate Petitioner. (R. 46) Because of the potential

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[1] A second count, charging petitioner with extorting, under color of official right, the $50,000, was dismissed by the government prior to trial. See App. A, *infra*, p. 2, n. 1.

[2] "Tr. ...." references are to the page of the transcript of evidence at trial, filed in the Court of Appeals. "R. ...." references are to the page of the trial record filed in the Court of Appeals. No Appendix was prepared or filed. See Rule 30, Fed. R. App. Pro., 28 USCA; Rule 24, Rules of the United States Court of Appeals for the Seventh Circuit, 28 USCA.

prejudicial nature of the conversation, as well as the lack of necessity of showing Gottlieb's state of mind in this income tax prosecution, the district judge refused to allow the conversation into evidence. (Tr. 225-c, 226)

Although he had conversations with Petitioner during the period the applications to rezone his property were being considered, Gottlieb never spoke to Petitioner about a payoff; Petitioner did not solicit and Gottlieb did not offer payments of money in any connection. (Tr. 317-18, 324, 331, 337-38)

The government did introduce, through Haskins' testimony, evidence that Haskins and Petitioner had two conversations—one preceding and one following passage of the approving City Ordinance—"concerning" the subject property. Although the defense made no effort to bar admission of the contents of these conversations, the government did not seek to elicit the contents from its witness. (Tr. 115-16; 116-17) Although no explanation for this failure was offered during trial, the government stated during oral argument before the Seventh Circuit "that its failure was predicated upon inability, for various reasons, to predict Haskins' answer." (App. A, *infra,* p. 18 n.8) However, at least one week prior to the commencement of trial, when he read notes of a conversation between Haskins and an attorney investigating another matter, the prosecutor knew that Haskins had said, immediately following the return of the indictment here, that he had never talked about money with Petitioner in relation to the property which was the subject of this case. (Tr. 289-90)

Gottlieb brought the envelope containing the $50,000 to Haskins sometime around April 8, 1969. The envelope was sealed. Gottlieb did not tell Haskins to give the envelope or its contents to Petitioner. (Tr. 338) Haskins did not open the envelope. (Tr. 122) On prior occasions he had received envelopes of similar size and shape from Gottlieb or Gottlieb's associate. (Tr. 198, 489) Haskins said that, after receiving the envelope, he telephoned Petitioner, and then personally delivered the envelope to Petitioner, whom he met at the doorway to Petitioner's private law office. Petitioner did not open the envelope in Haskins' presence, nor did the two men converse about the envelope, other than Haskins' saying that Gottlieb wanted him to give it to Petitioner. (Tr. 122-124)

Haskins was impeached in several respects by a statement he gave within a few days after the return of this indictment to an attorney representing another client in another matter. Haskins told this attorney that Gottlieb had come to his office and had given him a sealed envelope, as he had done many times in the past. Haskins said he could not describe the envelope and did not know whether it was large or small. (Tr. 489) He had no reason to suspect that this envelope contained money. His clients had never mentioned or suggested giving money to Petitioner. (Tr. 490-92)

He told the attorney he had taken the envelope to Petitioner's office, but he was not sure whether Petitioner was in the office at the time, and he did not know to whom he gave the envelope. He said it was possible that he gave the envelope to one of the office girls, or put it by the receptionist's desk. (Tr. 489)

Finally, Haskins told the lawyer he had never talked about money in relation to the property with Petitioner. (Tr. 489-90)

Testifying in his own behalf, Petitioner denied receiving money as described by Haskins, or receiving an envelope. (Tr. 646, 648, 650-51) In addition, the defense presented testimony showing that Petitioner played an insig-

nificant role in the processes whereby zoning change applications received initial approval from those agencies empowered to consider such requests, and ultimate approval from those municipal bodies who relied on the expertise of the agencies. (E.g., Tr. 475, 553, 560, 568, 570-72, 576; Defendant's Ex. 5)

In the opening portion of his final argument, in order to explain why Gottlieb would give Haskins an envelope containing $50,000 with instructions to give the envelope to Petitioner, after passage of the amending ordinance, when Petitioner and Gottlieb had not had conversations concerning the payment of money, and when there was no evidence of conversation between Petitioner and Haskins concerning the payment of money, government counsel argued as follows:

> "Paul Wigoda is not going to deal with Roy Gottlieb. Paul Wigoda is smart. He is not going to front himself to every land developer in the city. Paul Wigoda is going to deal with or through someone like Robert Haskins who is a bag man lawyer who handles zoning matters, and that is the way the thing went down.
>
> "Think about it: The bag man Haskins has a conversation with Wigoda, the bag man goes to the developers, the developers then get the money and bring the money back to the bag man and the bag man delivers it to the defendant Wigoda. That is why Roy Gottlieb testified he never ever, ever told Haskins to take that money to Wigoda or that Wigoda ever asked for any money. That is absolutely true. I don't doubt it for a moment that Wigoda never asked for any money because Wigoda is not going to front himself to Roy Gottlieb or Kenneth Tucker. He is going to deal with someone like Haskins because Haskins is the middle man. He is the bag man. That is the way he was used in this case.

> *"Now, it doesn't really matter what took place in those conversations between the parties that were not admitted into evidence.* However, you, the eleven jurors, may use your common sense and you may call upon your own human experience and common sense and *I don't think you have any difficulty in inferring what was said in these conversations."* (Tr. 927-28; emphasis added.)

After defense counsel objected, the District Judge ruled that:

> "I think the lawyers are entitled to make such logical inferences as the evidence warrants. It is up to the jury to judge those inferences which are not warranted and they may certainly disregard them." (Tr. 928)

Following an adverse jury verdict and denial of his motion for a new trial, during which the District Judge opined that the foregoing argument by government counsel was error, but "not sufficiently prejudicial to warrant a new trial" (R. 51, pp. 12-15), petitioner was sentenced to one year in the custody of the Attorney General.

The Court of Appeals opined that the argument was harmless error which "so closely bordered on impropriety as to deserve criticism." (App. A, *infra,* p. 17) Similarly, while viewing the argument as a "request for a common sense inference as to the contents of certain conversations [and] * * * not really germane to the crucial credibility question facing the jury" (App. A, *infra,* p. 17), the Court felt it "unbecoming for the government to omit inquiry [of its own witness] and then to urge the jury to draw an inference favorable to the government's case." (App. A, *infra,* p. 18) In sum, the Court concluded that the argument was "at least the type of close-to-the-line conduct government counsel should avoid," but did not affect the outcome of this trial. (App. A, *infra,* p. 18)

REASON FOR GRANTING THE WRIT

Both courts below have recognized that the prosecutor's argument in this case was improper. Both courts agree that this argument merited criticism. What the courts below have failed to recognize, however, is that this argument deprived petitioner of those Fifth and Sixth Amendment rights which insure the fundamental fairness of a criminal trial.

Berger v. *United States,* 295 U.S. 78, 88 (1935) set the standard by which a prosecutor's conduct must be tested:

> "[The prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

But the problems inherent in the closing argument in this case transcend those considered in *Berger.* The argument directly and falsely suggested to the jury that the government had evidence that Haskins had told Gottlieb Petitioner wanted money. It also told the jury the government had evidence that Haskins and Petitioner had discussed a payoff in their unoffered conversations. The full

context of the argument—which was expressly designed to explain, if it could, Gottlieb's adamant denial that petitioner had ever asked for or been promised money—demonstrates that the jurors were forcefully told they could infer: (1) that petitioner had asked Haskins for money, or been promised money by Haskins; and (2) that Haskins had told Gottlieb he wanted the money for petitioner. Once permitted to believe that the government had evidence which it could not introduce to support these inferences, the jury could ignore the very serious probability that Haskins had defrauded his own clients by keeping the money which Gottlieb delivered to him. Thus, by arguing in this fashion, the prosecutor explained for the jury why petitioner should be paid money in the manner described by Haskins when, according to the evidence, petitioner had not asked for or been promised money by anyone.

In this connection, the prosecutor explicitly told the jurors he was privy to the contents of the two unrevealed conversations, but the jurors were not, because the conversations themselves "were not *admitted* into evidence." (Tr. 928; emphasis supplied.) There could be no other reason for the prosecutor's referring to these conversations in this fashion if it were not for the forbidden purpose of conveying the impression that he knew the contents but somehow had been proscribed by the rules of evidence from revealing them to the jurors. *United States* v. *Fearns,* 501 F.2d 486 (7 Cir. 1974), and *United States* v. *Martinez,* 514 F.2d 334 (9 Cir. 1975), apply precisely to this sort of tactic.

This case does not merely question the right of a prosecutor to ask a jury to draw inferences. It questions the propriety of dangling logical inferences before a jury when

it is known that the inferences which have been dangled are spurious. *Cf. Napue* v. *Illinois,* 360 U.S. 264 (1959); *United States ex rel. Miller* v. *Pate,* 386 U.S. 1 (1967); *Mooney* v. *Holohan,* 294 U.S. 103 (1935); *United States* v. *Newman,* 3 Cir. 1974, 490 F.2d 139, 147. The government knew that Haskins had not talked to Gottlieb about paying money to Petitioner, yet it blatantly suggested that the jury reach that conclusion. The government intentionally withheld evidence of the Petitioner-Haskins conversations—at oral argument we learned, because it had been advised prior to trial that Haskins would not take an oath that those conversations related to money—and yet it asked the jury to infer that they related to payments of money. No matter what the prosecutor felt about Haskins' purported recantations, there was still no evidence of the type of conversation suggested by the argument. *Berger's* admonition concerning the faith and confidence juries place in such statements by a prosecutor is most applicable here, for, despite the total lack of such evidence, the prosecutor conveyed to the jury the government's assumed intimate knowledge that a conversation concerning money had taken place between Haskins and Petitioner.

The prosecutor's seeming withdrawal of his remarks following defense objection did not cure the false impression created by the initial statements. Counsel had already told the jury he had *evidence* which had not been "admitted" concerning the substance of the conversations. His "curative" statement was illusory. He did not disavow knowledge, or existence, of the suggested conversations. He merely told the jury, in substance, that whether Petitioner had asked or demanded, or whether Haskins and Gottlieb had promised without a demand, made no difference. That was the clear and only import of this statement that Petitioner was charged with a

"simple crime," receiving $50,000 "for whatever reason," and not reporting it. (Tr. 928)

Finally, the nature and effect of the District Judge's ruling when objection to this tactic was made has been misconstrued. The District Judge's initial ruling that "the lawyers are entitled to make such logical inferences as the evidence warrants" told the jury that, if they found the prosecutor's argument logical and appealing, they were free to draw the inferences which the prosecutor had suggested they draw.

At this juncture the District Judge did more harm than good, for the prosecutor's argument, however erroneous and improper, was appealing and logical. Its error was that it went beyond fact and encouraged the jury to follow the alluring path of logic to an admittedly erroneous conclusion.

The misconception concerning the effect of the District Judge's ruling seems to have been carried over in the Opinion's assessment of the impact of the prosecutor's argument on the jury. This is apparent from the conclusion that "the prosecutor's request for a common sense inference as to the contents of certain conversations is not really germane to the crucial credibility question facing the jury." (App. A, *infra,* p. 17) The argument, however, was a device intended to create an illusion of credibility for Haskins before the jury. The jury had been asked by the defense to reject Haskins' testimony partly on the basis of a latent but crucial conflict between Haskins and Gottlieb and on the further basis that Haskins' version—without evidence of a demand by, or promise to, Petitioner—made no sense. Gottlieb said, in addition to denying that Petitioner had ever asked for money, that he "absolutely"

did not tell Haskins to give the envelope to Wigoda. (Tr. 338) Haskins, on the other hand, said he did not know what was in the envelope and said that he told Wigoda, upon giving him the envelope, "Gottlieb wanted me to give you this." (Tr. 123-4) In view of Gottlieb's denial and the absence of any testimony suggesting a demand by, or promise to, Petitioner, the jury at this point could well have concluded that Haskins was lying when he said he did not know the contents of the envelope, that he was lying when he said that Gottlieb told him where to deliver it, and that he was lying when he said that he delivered it to Petitioner.

However, once told by the prosecutor that there were conversations between Haskins and Gottlieb and Haskins and Petitioner concerning this subject which had not been admitted into evidence, the jury could swing to Haskins' corner believing that the law of evidence was responsible for this significant discrepancy rather than Haskins himself. See *United States* v. *Newman*, 3 Cir. 1974, 490 F.2d 139, 147.

As the Record stands, Petitioner never asked for the money he was accused of receiving, nor had anyone ever offered or promised that money to him. Yet the jury considered this case under the impression that there was "evidence" showing that petitioner had solicited or agreed to the alleged payoff. There was no way for Petitioner to combat this false impression. He could not face his accuser. Having been allowed to believe that the government had evidence Petitioner had asked for the money, the jury could then easily conclude that he had received it, despite the improbability of his having done so.

CONCLUSION

For the above and foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No 74-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PAUL T. WIGODA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-CR-291
ABRAHAM L. MAROVITZ, *Judge.*

HEARD APRIL 10, 1975 — DECIDED AUGUST 20, 1975

Before FAIRCHILD, *Chief Judge,* CUMMINGS, *Circuit Judge,* and BRYAN, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* In April 1974, an indictment was returned against defendant, the alderman representing the 49th Ward of the City of Chicago. The second count of the indictment charged that defendant subscribed to a false income tax return for 1969 by substantially under-reporting his gross income in violation of 26 U.S.C.

* Senior District Judge Frederick vanPelt Bryan of the Southern District of New York is sitting by designation.

§7206(1).[1] The jury found defendant guilty and the district judge imposed a one-year prison sentence. This appeal followed. We affirm.

I. *Sufficiency of the Evidence*

In a somewhat half-hearted way, defendant contends that his motions for a judgment of acquittal should have been granted on the ground that the evidence was insufficient to establish his guilt beyond a reasonable doubt. This necessitates a summation of the important evidence. Of course, this Court does not make its own credibility determinations, so that the evidence and inferences most favorable to the Government's case are accepted. *Glasser* v. *United States*, 315 U.S. 60, 80.

On July 19, 1965, Roy Gottlieb and Kenneth Tucker signed an agreement to purchase the Edgewater Golf Club for $7,600,000. They deposited earnest money of $200,000. Although the balance of the purchase price was supposedly to be paid by November 1, 1966, the buyers exercised their right under the contract to pay an additional $200,000 deposit, thus extending the due date on the remaining $7,200,000 balance until November 1, 1967.

The contract permitted a further extension of the time for payment of the balance until November 1, 1968, if a third party initiated proceedings to downgrade the R-4 zoning classification of the property, which existed in

[1] Count one of the indictment charged extortion in violation of the Hobbs Act (18 U.S.C. § 1951) but was dismissed on motion of the Government prior to trial because of the panel decision in *United States* v. *Stasczuk*, 502 F.2d 875 (7th Cir. 1974). Presumably count one would not have been dismissed if the *en banc* opinion in that case, ... F.2d ..... (7th Cir. No. 74-1869, decided May 16, 1975), had been rendered at the time of this trial.

1965. The R-4 classification permitted the building of residence structures, including multi-family dwellings, and certain non-business structures such as libraries, churches and cemeteries. Gottlieb and Kenneth Tucker needed to secure a new, more permissive zoning classification before they could build their planned regional shopping center complex. Attorney Robert Haskins was retained to secure the rezoning. He ultimately received approximately $248,000 in fees for his work on the project.

In May 1967, Haskins filed an application with the City Council of Chicago requesting upgrading of the property's zoning to the planned development classification which would permit the construction of the shopping center, high-rise apartment units and a number of townhouses. Early the next month, the application was referred to the Chicago Plan Commission and the Council's Committee on Building and Zoning. Defendant sat on both bodies; his 49th Ward bordered the ward containing the land in question.

At the June hearings of the Chicago Plan Commission and the Committee on Building and Zoning of the Council, Alderman Jack Sperling of the 50th Ward, where the property was located, and others opposed the rezoning. Defendant successfully favored deferment of the proposal's consideration.

In late October 1967, Haskins and Gottlieb visited defendant in his office and suggested that he file an application to downgrade the zoning so that the developers would have another one-year extension of time to raise the $7,200,000 balance instead of forfeiting the $400,000 already paid. Two days later defendant introduced an ordinance to downgrade the zoning from R-4 to R-2, permitting only the construction of single-family residences.

Simultaneously, three other aldermen on record as opposed to the development plan co-sponsored a virtually identical downzoning ordinance. Thus the developers gained an additional year in which to secure the needed $7,200,000 to complete their purchase. Defendant never followed through on his proposed downzoning ordinance, so that it died in committee.

Before the spring of 1968, Gottlieb returned to defendant's office to discuss the Edgewater property. He reminded defendant about the June 1967 hearing on the developers' upgrading application. Gottlieb testified that he told the defendant that "if we didn't get the property zoned that I didn't think anyone would ever make any money out of the project." (Tr. 267). Defendant agreed to determine why no action had been taken on that application.

Before the November 1, 1968, deadline, the developers secured the necessary $7,200,000 and the sale of the Edgewater property was consummated.

At a January 17, 1969, hearing of the Chicago Plan Commission, defendant voted to approve the planned development, as revised in late 1968 or early 1969, although he had previously sponsored the downzoning ordinance. Until this time, defendant had repeatedly advocated the acquisition of the Edgewater property by some public agency so that it could be preserved as open space for public use.

On January 23, 1969, Haskins presented the case of the developers before the City Council's Committee on Buildings and Zoning. As a member, defendant witnessed the presentation. Subsequently, he voted with a majority of that committee to recommend approval of the planned development by the full City Council.

Soon after the committee hearing, Philip Krone, a consultant of the Illinois Department of Conservation, visited defendant in his office and urged him to table the planned development of the Edgewater property, so that it could be purchased by the State for $9,500,000 in view of its then R-4 zoning. Krone informed the defendant that a bill to purchase the land for recreational purposes was to be introduced in the State legislature. Defendant was hostile to Krone's suggestion. Te rezoning sought by the developers would increase the cost of the land to any public purchaser.

On March 14, 1969, the Edgewater planned development was approved by the full City Council. Even though, as noted earlier, he had previously introduced the downzoning ordinance and had openly favored the dedication of the property to public use, defendant spoke and voted in favor of the revised, planned development. Other aldermen with wards contiguous to that containing the Edgewater property voted to disapprove the proposed rezoning, in accord with their consistently advocated view that the public should have the benefit of the open land.

Prior to the passage of the ordinance and afterwards, Haskins discussed the Edgewater property with defendant. Haskins and Gottlieb subsequently met in Haskins' office to discuss the property, and later Gottlieb and Kenneth Tucker met seriatim about the project.

On April 7, 1969, Kenneth Tucker and his uncle, Oscar Tucker, met at the bank where Oscar Tucker maintained a safety deposit box containing a large sum of cash under the name Oscar Goldman. Oscar Tucker gave his nephew $50,000 in $100 and $50 bills from the box. Kenneth Tucker displayed this money to Gottlieb in the former's office. They recounted it, put it in an envelope and locked it in Kenneth Tucker's office safe.

On April 8, 1969, Gottlieb and Haskins met at Haskins' office and Gottlieb handed the lawyer a sealed envelope containing the $50,000. Thereafter Haskins telephoned and then visited defendant's office where he handed him the sealed envelope, telling defendant that "Gottlieb wanted me to give you this." Defendant did not report that $50,000 as income.

On December 9, 1969, defendant moved the City Council to consider a resolution asking the Governor of Illinois to implement acquisition of the property pursuant to prior legislation. This resolution was passed unanimously, and the rezoned land was sold to the State of Illinois and the Chicago Public Buildings Commission for a total price of $18,300,000, giving the developers an approximate net profit of $6,000,000. Three to four million dollars of that profit derived from the increased value of the land caused by the 1960 rezoning which defendant had favored in two committees and in the final council vote.

At the trial, Haskins testified that on April 8 he delivered to defendant the same envelope he had received from Gottlieb. He told the jury that an envelope containing 500 $1.00 bills was about the same size and weight as the envelope he delivered to defendant.

In *United States* v. *Ernest, Inc.*, 509 F.2d 1256, 1261 (7th Cir. 1975), we discussed circumstantial evidence as follows:

> "Where the evidence is circumstantial it is not necessary that it be such as to exclude every reasonable hypothesis other than that of guilt. As with direct evidence, it is only necessary that the jury be convinced of guilt beyond a reasonable doubt." (Citations omitted.)

Thus there is no requirement that circumstantial evidence, in order to sustain a guilty verdict, must exclude every

reasonable hypothesis but that of guilt. All that is necessary is that such evidence convince the jury beyond a reasonable doubt of the defendant's guilt. *Holland* v. *United States*, 348 U.S. 121, 139-140. A guilty verdict must be upheld on an insufficiency of the evidence challenge "if a rational trier of fact could have found beyond a reasonable doubt" that defendant committed the crime charged. *United States* v. *Scher*, 476 F.2d 319, 320 (7th Cir. 1973).

Applying these principles and viewing the evidence in the light most favorable to the Government, the jury could properly find that defendant received a $50,000 cash payment in return for his assistance with respect to the Edgewater property and that he did not report this sum on his 1969 income tax return.

II. *Restrictions on Cross-Examination*

Defendant contends that his counsel could not effectively cross-examine Messrs Haskins, Gottlieb and Tucker because the district judge did not permit him to examine an Internal Revenue Service report on Haskins and pretrial statements furnished to the Government by Haskins, Gottlieb, Kenneth Tucker and another. Defendant relies on both *Brady* v. *Maryland*, 373 U.S. 83, and the Jencks Act (18 U.S.C. §3500).

The IRS document in question was Special Agent Richard Starr's report on Haskins' civil and criminal tax liability. Government counsel submitted this report to the trial judge for *in camera* inspection, advising him that nothing in the report was relevant to Wigoda's trial. The prosecutor conceded that if the cross-examination of Haskins disclosed that anything in the report was relevant, the court could give defendant access to the report without objection. This procedure comported with 18 U.S.C.

§3500(c). The judge stated that he would read the report before Haskins was examined and would make it accessible to defense counsel "in the event during the cross-examination [of Haskins] I feel there is material in here that the defendants [lawyers] are entitled to, either under *Brady* or by virtue of disclosing some undisclosed motivation or interest." (Tr. 38).

After Haskins' direct examination, the court supplied defense counsel with considerable information from the Starr report, though not the full report itself, for the purpose of cross-examination. Thus the court stated, quoting from the Starr report:

> "In summary, of the $110,517.49 total receipts not deposited, $67,000.00 was received in currency, and $43,517.49 was received by checks. These checks were either cashed by Haskins, endorsed over to third parties to pay incurred debts, or were deposited into his wife's account at the Beverly Bank." (Tr. 463.)

Defense counsel was also advised by the court that the breakdown of the unreported legal receipts not deposited by Haskins was $47,600 for 1968, $38,417.49 for 1969, and $24,500 for 1970. As the court also revealed, the report showed that during his conversations with an IRS agent "Haskins said he did not include certain non-deposited legal receipts in the audit and he said he forgot to report it" (Tr. 468). The judge stated that in the tax years 1968-1970 Haskins failed to report 54% of his total income and that he had not been immunized from prosecution with respect to his tax liability. Finally, the judge informed counsel that the report showed that Haskins did not include in his return profits and loss from the Edgewater partnership in which he held a 3% interest. (Tr. 129, 460-469.) This information resulted in a stipulation read to the jury as to what Special Agent Starr would testify

if called as a witness. The stipulation showed that Starr had prepared a report of Haskins' criminal tax liability reflecting a finding of unreported legal income as stated above. The stipulation also showed that when he was confronted by a revenue agent with certain unreported items, Haskins admitted these non-deposited items were not included in the gross receipts of his partnership returns and that certain profits and loss from the Edgewater limited partnership were not included in his tax returns for 1969 and 1970. (Tr. 801.)

Defendant does not deny that before trial his counsel were also furnished by the Government with a memorandum detailing the tax negotiations between the Government and Haskins. According to the Government's uncontroverted brief, this memorandum set forth "the precise nature of the assurances" made to Haskins. The memorandum is summarized as follows in the Government's brief:

> "Thus, the defense was advised that Haskins had engaged in a series of discussions with representatives of the United States Attorney's Office and the Internal Revenue Service, that Haskins was initially advised that information which he provided would not be used against him and that the United States Attorney's Office would recommend that he not be prosecuted for criminal tax matters then under investigation. The memorandum disclosed that Haskins withdrew his voluntary cooperation and that his attorney was then advised that the criminal tax matters would take their normal course through the Justice Department. It related the application for an entry of an immunity order and explained that the United States Attorney's Office had informed the Department of Justice Tax Division that, in its opinion, Haskins' tax investigation should take its normal course but that prosecution should be handled by a Tax Division Attorney rather than one from this office [U.S. Attorney for the North-

> ern District of Illinois]. The memorandum also made it clear that Haskins' attorney was aware that the tax case would be unaffected by the testimony elicited pursuant to the immunity order." (Br. 19-20.)

Special Agent Starr's report is contained in sealed material furnished as part of the record on appeal. We have read the report and conclude that it does not include material exculpating defendant under the rule of *Brady* v. *Maryland, supra.* Furthermore, the information from the report provided to defendant's counsel after an *in camera* inspection satisfied the disclosure requirements of the Jencks Act. Thus the district court's decision that the full report need not be revealed under the Jencks Act was not "clearly erroneous." *United States* v. *O'Brien,* 444 F.2d 1082, 1087 (7th Cir. 1971).

Together with the pretrial memorandum of the negotiations between the Government and Haskins, the information supplied by the trial court provided defendant with the necessary material to probe both Haskins' financial condition and any governmental promises or pressures. As in *United States* v. *DeLeon,* 498 F.2d 1327, 1332-1333 (7th Cir. 1974), the court advised defendant's counsel that they would be allowed to cross-examine Haskins as to other payoffs which he may have made in connection with zoning matters (Tr. 133-134), but the relevant questions were never asked. Wigoda's counsel were provided with enough facts from the Internal Revenue Service report and from the Government's memorandum of negotiations to cross-examine Haskins adequately. His financial status and tax problems were fully developed on cross-examination and in closing argument. Further access to information in the IRS report was unnecessary and would not have furthered Wigoda's case.

Again relying on the Jencks Act and *Brady* v. *Maryland, supra,* defendant claims he was entitled to examine the pretrial statements of witnesses Haskins, Gottlieb, Kenneth Tucker, and Leonard Ash, the last of whom served as vice-president and corporate counsel for Gottlieb's and Tucker's company, Kenroy, Inc. These statements were submitted to the trial court for *in camera* inspection pursuant to 18 U.S.C. §3500(c). We have examined them and agree that they do not relate to the Edgewater Golf Club matter and would not aid defendant. Thus the district court's ruling that the witnesses' statements were non-producible under the Jencks Act because they did not relate to areas explored on direct examination was not "clearly erroneous." See *United States* v. *O'Brien, supra.*

Defendant also asserts that the court's refusal to turn over the statements of these witnesses violated his rights to due process under *Brady* v. *Maryland, supra.* Defendant contends that if the statements of Haskins or the others showed that Haskins had pretended to act as the middleman in other payoffs and had instead kept the money himself, that material would be producible under *Brady* because it would support the defense theory of the instant case that Haskins had never passed the $50,000 to defendant, but had kept it himself. Our inspection of the statements of the witnesses indicates that there was absolutely no indication that Haskins had acted as an unreliable middleman in any other payoff. Haskins' statements show only that he assertedly passed money to a county official on behalf of other clients with respect to other real estate. The statements of the other three witnesses concern the so-called Pauling property in Elk Grove Village and have no connection with Haskins. A careful examination of these statements satisfies us that the district court correctly ruled that their production was not required under either the Jencks Act or *Brady.*

Defendant's counsel claim on appeal that any evidence of Haskins' involvement in another payoff was producible under *Brady* because they might then have called the official involved in the other payoff, since a denial of receipt by him would bolster the defense theory that Haskins did not pass the money on to the defendant.[2] As the Government points out, the admissibility of such extrinsic evidence to attack Haskins' credibility is doubtful. See generally, *United States* v. *Conrad*, 448 F.2d 271, 274-275 (9th Cir. 1971); Fed. R. Evid. 403 and 608(b). If they did not lead to admissible evidence, the statements certainly could not have been material in the *Brady* sense. Moreover, it is again noteworthy that even though the trial judge announced that defense counsel could ask Haskins whether he paid money to other officials in other zoning matters without mentioning names and defense counsel indicated that they would so ask, such questions were not put, presumably as a matter of trial strategy.[3] See *United States* v. *Cook*, 432 F.2d 1093, 1101-1102 (7th Cir. 1970), certiorari denied, 401 U.S. 996. Finally, the district court indicated that the defense could explore the existence of unrelated payoffs on cross-examination, but that no names of alleged recipients of payoffs could be mentioned. The "trial" of another public official, as contemplated by the defendant's argument on appeal that such an official might have been called as a witness to deny receipt of a payoff supposedly

[2] In the court below, defendant's counsel did not suggest this possible use of the statements in the colloquy before the court's ruling.

[3] It is easy to imagine the damage that might be done to defendant's case if it was revealed on cross-examination that Haskins had made similar payoffs to public officials. The decision to forego such a revelation, especially since Haskins was already thoroughly impeached, is understandable.

made by Haskins, exemplifies the introduction of confusing and potentially prejudicial collateral issues which the district court sought to avoid in refusing to reveal to defendant's counsel the contents of the witnesses' statements, which were not relevant to their direct testimony.

In sum, nothing in these statements indicate that Haskins defrauded any clients by retaining bribes rather than passing them along to public officials. Likewise, nothing in them reveals anything about government promises of non-prosecution. Since Haskins was thoroughly impeached by his own testimony regarding his conduct and since defense counsel chose not to explore the possibility of other payoffs on cross-examination, it cannot be said that the district court's decision not to disclose these documents denied Wigoda a fair trial within the ambit of *Brady*.

III. *Closing Argument*

During the course of the trial the jury learned that conversations had been held between Gottlieb and defendant, Haskins and defendant, and Haskins and Gottlieb with respect to the Edgewater property. The Government did not attempt to introduce the contents of at least one of the Haskins-defendant conversations, and the district judge refused to admit into evidence the substance of the Haskins-Gottlieb conversations which took place two or three weeks after the rezoning ordinance was passed and before the $50,000 was delivered to Wigoda.[4]

[4] The Government's offer of proof as to the excluded Haskins-Gottlieb conversation did not directly incriminate defendant, but concerned Haskins telling Gottlieb to obtain $50,000 because Haskins needed "to spread it out." The trial judge's apparent reason for refusing the conversation was his determination that its probative value was outwieghed by the danger of unfair prejudice to the defendant. See Fed. R. Evid. 403.

In his closing argument, the prosecutor called the jury's attention to a conversation between Gottlieb and defendant in late 1967 or early 1968 where Gottlieb allegedly "got the message across" that defendant could expect remuneration for his help. The prosecutor also referred to a conversation between Haskins and defendant and to a subsequent conversation between Haskins and Gottlieb which led to procurement of the $50,000. Then, after referring to Gottlieb's testimony, the prosecutor stated as follows:

> "Now, it doesn't really matter what took place in those conversations between the parties that were not admitted into evidence. However, you, the eleven jurors, may use your common sense and you may call upon your own human experience and common sense and I don't think you [will]have any difficulty in inferring what was said in these conversations."

After this statement, defendant's counsel objected. Thereupon, the following colloquy occurred between defendant's counsel, the trial judge, and the prosecutor:

> "Mr. Wolfson [defendant's counsel]: He is asking the jury to infer something from nothing.
>
> "The Court: I think the lawyers are entitled to make such logical inferences as the evidence warrants. It is up to the jury to judge those inferences which are not warranted and they may certainly disregard them.
>
> "All right.
>
> "Mr. Webb [prosecutor]: What was said in these conversations isn't really important because the crime charged in the indictment is a simple crime. The indict charges Mr. Wigoda received a $50,000 payoff for whatever reason and didn't report it on his tax return."

In denying defendant's motion for a new trial, the district judge stated that it was "reasonably clear" that the

prosecutor's questioned remark was improper because the Government had not offered the Haskins-Wigoda conversation and had offered, but had not been permitted to introduce, the Haskins-Gottlieb conversation. Accordingly, he ruled that the prosecutor could not rightly ask the jury to speculate on the content of those conversations.[5] Nevertheless, the trial judge concluded that this error was not sufficiently prejudicial to require a new trial. The court stated that the prosecutor had corrected his error after defendant's counsel had objected to the remarks and after the judge told the jury to reject unwarranted inferences. The judge noted that this single objectionable statement occurred in a 60-page closing argument and must be reviewed in relationship to the entire trial.[6] He concluded as follows:

> "In reviewing the entire record, this court does not believe—based upon its twenty-five years experience as a trial judge—that this remark, modified by the judge and corrected by the prosecutor and collateral to the case was sufficiently prejudicial to sway a juror. While in every instance it is important to strike to conduct a perfect trial, this goal is rarely ever achieved and so the courts make no such demand. *United States* v. *Wexler*, 79 F.2d 526, 529-30 (2nd Cir. 1935) (Hand, J.)
>
> "Had this court any serious doubt that Wigoda's rights had been prejudiced, defendant would be granted a new trial. We have no such doubt, and so de-

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[5] At the post-trial hearing on the motion for a new trial the district court explained that he did not hear part of the argument of the prosecutor, resulting in his failure to note the error in the argument. The transcript contains many instances of the judge asking witnesses or counsel to speak more loudly because an infection had impaired his hearing.

[6] Without considering the exhibits or the arguments to the jury, the trial transcript consumed 868 pages.

fendant's motion for a new trial is denied, and judgment is entered on the verdict."[7]

The defendant urges that the prosecutor was improperly calling upon the jury to infer from the Haskins-Gottlieb conversations, previously excluded by the trial judge, that Haskins had told Gottlieb defendant wanted money. Similarly, defendant contends that the prosecutor's argument asked the jurors to infer that Wigoda and Haskins discussed a payoff in the unoffered conversations between them. This was not actually what transpired. The jury was merely asked to draw upon its own experience and common sense to infer what was said in the conversations, and, as seen, the trial judge immediately cautioned the jury by stating, "It is up to the jury to judge those inferences which are not warranted and they may certainly disregard them." Thereupon the prosecutor immediately advised the jury, to the same effect that he had prefaced his remarks, that what was said in the conversations was not important anyway. The jury was later charged that it "must consider only evidence properly admitted in the case" and admonshed that "statements and arguments of counsel are not evidence. They are intended only to assist the jury in understanding the evidence and the contentions of the parties."

The reasons given by the district court for finding the prosecutor's momentary error in arguing to the jury legal-

[7] The remark of the prosecutor merely requested that the jury infer the contents of certain conversations, the existence of which was a part of the record. The prosecutor did not suggest that he had information inculpating the defendant which was not in evidence. Moreover, the remark was "modified by the judge, and corrected by the prosecutor and collateral to the case." Therefore, *United States* v. *Fearns*, 501 F.2d 486 (7th Cir. 1974), *United States* v. *Martinez*, 514 F.2d 334 (9th Cir. 1975), and the other cases cited by the defendant are distinguishable.

ly harmless, especially in light of his long experience as a trial judge and his superior position for judging the impact of the remark upon the jury by virtue of his presence at the trial, might alone be enough to satisfy this Court that the error was not prejudicial. Our review of the testimony and arguments in the case suggests further support for the district court's ruling. Both sides accept that Kenneth Tucker procured $50,000 from his uncle and gave it to Haskins. No one, other than Haskins, testified that the envelope containing the money was originally intended for or actually delivered to the defendant. Defendant took the stand and denied ever receiving the envelope with the mony and further denied performing any services meriting such a payment. The crucial question decided by the jury was, therefore, which of the two men testified truthfully as to the delivery of the money. The prosecutor's request for a common sense inference as to the contents of certain conversations is not really germane to the crucial credibility question facing the jury. The jury's idea of what was said in these conversations would, it seems, depend upon which of the two crucial witnesses they believed. The jury made that credibility determination based upon its judgment as to the demeanor and possible bias of the two men and the weight which it accorded the circumstantial evidence introduced, particularly the evidence intended to show how defendant "earned" the payoff. Thus the contents of the conversations were, as the prosecutor twice noted, not important to the verdict of the jury. Therefore, we agree with the trial court that the request for an inference as to the contents of these conversations was not prejudicial error in this case.

While not amounting to prejudicial error on the facts of this case, the conduct of government counsel so closely bordered on impropriety as to deserve criticism.

In connection with the Haskins-Gottlieb conversation, government counsel asked the jury to draw inferences concerning the content of the conversation. Testimony as to such content had been excluded during trial as unduly prejudicial. See note 4, *supra*. Since the jury knew a conversation occurred, the jury might well, under the circumstances, draw inferences as to its substance, but government counsel would have shown more respect for the court's ruling that the content was prejudicial if he had not suggested to the jury that it do so, and thus seek to focus the jury's attention on the excluded substance.

Concerning the Haskins-Wigoda conversation, the Government, after choosing not to inquire of its own witness, Haskins, as to the substance of the conversation, asked the jury, in argument, to draw inferences as to its content. Ordinarily it would be presumed that the Government did not inquire of its own witness because the answer would be unfavorable to the Government. Again it is unbecoming for the Government to omit inquiry and then to urge the jury to draw an inference favorable to the Government's case.[8]

We do not think the practice followed in these two instances affected the outcome of this trial; however, it is at least the type of close-to-the-line conduct government counsel should avoid.

Affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

[8] Although the record before the jury suggested no explanation for failure to ask Haskins what was said, the Government stated in oral argument in this Court that its failure was predicated upon inability, for various reasons, to predict Haskins' answer.

APPENDIX B

Opinion by Judge Cummings
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

August 20, 1975

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Frederick vanPelt Bryan, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-2007 vs.

PAUL T. WIGODA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 CR 291 — Abraham L. Marovitz, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this court filed this date.

* Senior District Judge Frederick vanPelt Bryan of the Southern District of New York is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
November 6, 1975
Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Frederick vanPelt Bryan, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-2007 vs.
PAUL T. WIGODA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74 CR 291 — Abraham L. Marovitz, Judge.

ORDER

On consideration of the petition of the appellant, Paul T. Wigoda, for a rehearing by the Court in the above-entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

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* Senior District Judge Frederick vanPelt Bryan of the Southern District of New York is sitting by designation.